

FULL NAME

JAE JUNE PAK, et al.

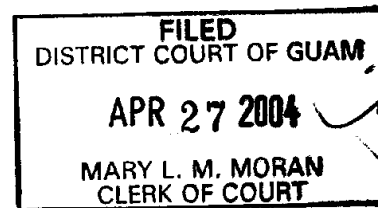
02116-093

COMMITTED NAME (if different)

FEDERAL CORRECTIONAL INSTITUTION
P. O. BOX. 1731 WASECA, MN 56093

FULL ADDRESS INCLUDING NAME OF INSTITUTION

PRISON NUMBER (if applicable)



UNITED STATES DISTRICT COURT
DISTRICT OF GUAM

JAE JUNE PAK, et al.

PLAINTIFF(S)

v.

GEORGE W BUSH, BILL CLINTON,
JOHN ASHCROFT, JANNET RENO, AND
SIX UNKNOWN NAMES AGENTS.

DEFENDANT(S).

CASE No. CV

04-00023

(To be supplied by the Clerk)

CIVIL RIGHTS COMPLAINT
PURSUANT TO (check one)

☒ 42 U.S.C. § 1983

or

☒ Bivens v. Six Unknown Agents
403 U.S. 388 (1971);

A. PREVIOUS LAWSUITS

- 1) Have you brought any other lawsuits in a federal court while a prisoner: ☐ Yes ☒ No
- 2) If your answer to 1 is yes, how many? FIRST Describe the lawsuit in the space below. (If there is more than one lawsuit, describe the additional lawsuits on an attached piece of paper using the same outline.)

RECEIVED

APR 27 2004

DISTRICT COURT OF GUAM
HAGATNA, GUAM

Page 1 of 6

a. Parties to this previous lawsuit:

Plaintiff _____

Defendants _____

b. Court _____

c. Docket or case number _____

d. Name of judge to whom case was assigned _____

e. Disposition (For example: Was the case dismissed? If so, what was the basis for dismissal? Was it appealed? Is it still pending?) _____

f. Issues raised: _____

g. Approximate date of filing lawsuit _____

h. Approximate date of disposition _____

B. EXHAUSTION OF ADMINISTRATIVE REMEDIES

1) Is there a grievance procedure available at the institution where the events relating to your current complaint occurred? ☐ Yes ☐ No

2) Have you filed a grievance concerning the facts relating to your current complaint?
☐ Yes ☐ No

If your answer is no, explain why not _____

3) Is the grievance procedure completed? ☐ Yes ☐ No

If your answer is no, explain why not _____

4) Please attach copies of papers related to the grievance procedure.

C. JURISDICTION

This complaint alleges that the civil rights of plaintiffs JAE JUNE PAK, 02116-093, et al.
(print plaintiff's name)

who presently resides at FCI P. O. BOX. 1731 WASECA, MINNESOTA 56093, were violated
(mailing address or place of confinement)

by the actions of the defendant(s) named below, which actions were directed against plaintiff at _____

(institution/city where violation occurred)

on (date or dates) _____, _____, _____
(Claim I) (Claim II) (Claim III)

(You need not name more than one defendant or allege more than one claim; however, make a copy of this page to provide the information below if you are naming more than five (5) defendants.)

1) Defendant GEORGE W BUSH resides or works at
(full name of first defendant)

THE WHITE HOUSE AND EXECUTIVE OFFICE 1600 PENNSYLVANIA AVE, NW WASHINGTON, DC 20500
(full address of first defendant)

THE PRESIDENT OF THE UNITED STATES OF AMERICA
(defendant's position and title, if any)

The defendant is sued in his/her: ☒ individual ☐ official capacity. (Check one or both).

Explain how this defendant was acting under color of law:

2) Defendant _____ resides or works at
(full name of second defendant)

_____, and is employed as
(full address of second defendant)

(defendant's position and title, if any)

The defendant is sued in his/her: ☐ individual ☐ official capacity. (Check one or both.)

Explain how this defendant was acting under color of law:

3) Defendant _____ resides or works at
(full name of third defendant)
_____, and is employed as
(full address of third defendant)

(defendant's position and title, if any)

The defendant is sued in his/her: ☐ individual ☐ official capacity. (Check one or both.)

Explain how this defendant was acting under color of law:

4) Defendant _____ resides or works at
(full name of fourth defendant)
_____, and is employed as
(full address of fourth defendant)

(defendant's position and title, if any)

The defendant is sued in his/her: ☐ individual ☐ official capacity. (Check one or both.)

Explain how this defendant was acting under color of law:

5) Defendant _____ resides or works at
(full name of fifth defendant)
_____, and is employed as
(full address of fifth defendant)

(defendant's position and title, if any)

The defendant is sued in his/her: ☐ individual ☐ official capacity. (Check one or both.)

Explain how this defendant was acting under color of law:

E. CLAIMS*

CLAIM I

The following civil right has been violated: NO VIOLATION OF FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA AND FEDERAL CRIMINAL LAWS, INADMISSIBLE WITNESSES TESTIFIED IN THE CRIMINAL DISTRICT COURT, NOR WITNESS STATEMENT, NOR INFORMANTS, NOR FACTS, NOR CIRCUMSTANCES, NOR SAID CONSPIRACY, NOR ANY COMPOUND, NOR MIXTURE EVIDENCE, NOR HARMLESS ERROR, NOR INCRIMINATE, NOR COECION AND DURESS OF GUILTY, OR AGREEMENT, NOR INDUCE, NOR ENTRAPMENT, NOR DISCUSSIONS, NOR DISMISSAL OF OTHER CHARGES, NOR ADVICE TO DEFENDANT PLEA OF GUILTY, HEARSAY EXCEPTION RULES BY IMMEDIATELY RELEASE, NOR DEFAMATION, NOR SLANDER, NOR LIBEL, VICTIM OF CRIME, THE TERM OF MISTRIAL, DISCHARGE, PARDON, WITHIN TEN DAYS, THE WRIT OF CERTIORARI, AND TRIAL BY JURY.

Supporting Facts: [Include all facts you consider important. State the facts clearly, in your own words, and without citing legal authority or argument. Be certain you describe, in separately numbered paragraphs, exactly what each DEFENDANT (by name) did to violate your right.]

*If there is more than one claim, describe the additional claim(s) on another attached piece of paper using the same outline.

THE PRECEDENTS :

BIVENS 29 L Ed 2d 619. 338 F 2d 456, 462-3.

526 F 2d 442, 459. 537 F 2d 210, 212. 516 F 2d 961, 963.

432 F 2d 659, 676. 434 F 2d 1081. 28 L Ed 2d 251.

F. REQUEST FOR RELIEF

I believe that I am entitled to the following specific relief:

A WRIT OF ATTACHMENT AND GARNISHMENT
COMPENSATORY AND PUNITIVE DAMAGES

THE SUM OF THE AMOUNT CHARGE TWO MILLIONS DOLLARS, IMMEDIATELY FULL
PAYMENT, WITHIN TEN DAYS, THE NAMES OF LIST FOR EACH PERSON TO PAY TWO THO-
USAND DOLLARS ONLY, AND LESS BALANCE AMOUNT IS THE HALF AND HALF FOR JAE JUNE
PAK AND YOUNG YIL JO, AND TRIAL BY JURY.

WITHOUT COURT FEES BY 18 USCA 3524(h), 28 USCA 1923(b), PAID BY U. S. AND
TRIAL BY JURY.

APRIL 19, 2004
(Date)

Prayer, JAE JUNE PAK, 02116-093, et al.
(Signature of Plaintiff)

INMATE LAWYER, YOUNG YIL JO, 01183-112

Young Yil Jo.

" ATTACHMENT EXHIBITS "

THE DOCUMENT EVIDENCE
A SUMMONS
A NAMES OF LIST
A CERTIFICATE OF SERVICE

PLAINTIFF(S) OR AND OTHERS

RIOS 15341-047	GARCIA 07926-029	WHITE 06908-073
ROMO 06972-196	RUSH 11962-045	ALEXANDER 52279-098
DIAZ 04679-046	FELIX 02051-112	NAHOE 34363-198
ESPINOZA 12316-030	WARREN 06935-091	MILLER 08485-029
KOULAVONGSA 09003-073	DAMERVILLE 04259-030	SMITH 28583-013
STANCIEL 05098-027	PAYNE 65190-065	MYRICK 04755-030
RICHARDSON 06963-033	TOBON 429930-054	LE 01923-029
TRAN 00634-111	MCMILLAN 05599-041	BROWN 12046-030
NAVARRETTE 78828-080	EVINK 07482-041	SYKES 20387-039
JIMENEZ 07949-112	BUTCHER 11936-073	WOOD 27141-053
OZUA 40709-198	CABAN 05782-030	BLAIR 07943-029
ORBINO 83130-022	GONZALEZ 15720-112	WEBB 03922-025
LARA 15578-047	BUCIO 58392-097	JOHNSON 07685-045
VELASQUEZ 09605-112	BARRAGAN 10660-097	PARKER 13995-045
DUARTE 13528-051	ELDWORTH 98282-024	PARROTT 16604-047
CONTRERAS 05985-030	PADILLA 09449-112	ROSE 07611-084
MARTINEZ 06002-046	ROBISON 06386-046	ROTIMI 14244-424
FERNANDEZ 07301-059	CHAPARRO 61615-065	TOKVAM 06295-041
BALDOMERO 61695-065	GUTIERREZ 49448-198	HUNTER 13112-026
MONACO 13314-006	QUINTANILA 05124-030	ELLZEY 12274-045
VONG 04955-041	GIBSON 11268-095	HELLING 10474-041
NGUYEN 35544-019	TAYLOR 26276-086	BOYLES 08452-029
JARAMILLO 12293-030	VELOS 05949-030	DILLARD 10080-023
AGUILERA 05948-424	DANIELS 25623-044	DAGUE 08570-029
MORONES 08102-029	MONSON 06685-029	CLAUSE 07474-046
ENGLAND 06328-112	BEHRENS 12385-030	TAYLOR 17372-047
CALDERIN 15590-047	JIMENEZ 08063-029	SANDOS 09720-081
BARRAZA 15252-047	CRUZ 01862-029	ROYS 28406-013
SPIDELL 15645-047	FORT 06338-041	RIDER 07274-046
UNG 01922-029	SMITH 08349-031	VALLE 13741-097
HERNANDEZ 07674-097	LARIZZA 15647-086	LOOP 10581-073
TREVINO 28171-044	ARRIOLA 40802-004	MAYS 76952-198
TAKEN ALIVE 12312-073	FURGUSON 47415-053	MENDOZA 01447-041
ABANDY 09315-424	GREEN 14227-045	PRINCE 10585-085
HOUSTON 08803-041	GHANDA 07472-059	LARIOS 09990-041
SHEPPARD 14062-045	CAMORA 99365-011	

UNITED STATES DISTRICT COURT
DISTRICT OF GUAM
OFFICE OF THE CLERK

JAE JUNE PAK, et al.

PLAINTIFF(S)

vs.

GEORGE W BUSH, BILL CLINTON,
JOHN ASHCROFT, JANNET RENO, AND
SIX UNKNOWN NAMES AGENTS.

DEFENDANTS(S)

CASE NUMBER

CV-

A WRIT OF S U M M O N S

TO THE ABOVE-NAMED DEFENDANT(S), You are hereby summoned and required to
file with this court and serve upon

Plaintiff's attorney, whose address is: JAE JUNE PAK, et al.

02116-093, D-UNIT

FCI P. O. BOX. 1731

WASECA, MINNESOTA 56093

an answer to the complaint which is herewith served upon you
within TEN days after service of this summons upon you, exclusive
of the day of service. If you fail to do so, judgment by default
will be taken against you for the relief demanded in the complaint.

BY JURY for 24 hours with file.

DATE: APRIL 19, 2004

CLERK, U.S. DISTRICT COURT

By _____

Deputy Clerk

(SEAL OF THE COURT)

S U M M O N S

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C.A. NO. 03-10452

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,)	Court of Appeals Docket
)	No. 03-10452
Plaintiff-Appellee,)	
)	District Court Case
vs.)	No. CR00-00150
)	Guam (Hagatna)
JAE JUN PAK,)	
)	
Defendant-Appellant.)	
_____)	

OPENING BRIEF OF APPELLANT
JAE JUN PAK

~~Attorneys for Appellant Jae Jun Pak~~

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COPY

STATEMENT OF ISSUES FOR REVIEW

1. Whether the district court violated *Apprendi* by failing to inform the defendant of his right to have a jury determine the quantity of drugs beyond a reasonable doubt.
2. Whether the district court's finding that the defendant imported over 50 grams of methamphetamine, without first advising the defendant that he had a right to jury determination of that fact beyond a reasonable doubt, also violated *Apprendi*.
3. The *Apprendi* errors are plain, affect the substantial rights of the defendant, and seriously affect the fairness, integrity or public reputation of judicial proceedings requiring reversal.
4. The District Court erroneously held that the defendant failed to raise the coercion and duress factors prior to sentencing, and thus the denial for downward departure was clearly erroneous.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Ninth Circuit has jurisdiction over this appeal by virtue of 28 U.S.C. § 1291. Defendant-Appellant timely filed his notice of appeal with the United States District Court of Guam ("District Court") on August 22, 2003. This appeal to the Court of Appeals for the Ninth Circuit is taken from the judgment of conviction entered by the District Court on August 14, 2003.

BAIL STATUS

The defendant is incarcerated at the Federal Correctional Institute in Waseca, Minnesota following sentencing after guilty plea, to 132 months of imprisonment for importation of over 50 grams of methamphetamine.

STATEMENT OF FACTS

On December 27, 2000 the defendant was indicted for conspiracy to import over 50 grams of methamphetamine in violation of 21 U.S.C. § 952(a), 960 and 963. The defendant was additionally indicted for importation of methamphetamine and attempted possession of methamphetamine with intent to distribute. On January 5, 2001, the defendant entered into a plea agreement with the United States Attorney agreeing to enter a guilty plea to one count of conspiracy to import over 50 grams of

methamphetamine. On January 8, 2001, the court held a change of plea hearing. The trial court did not advise the defendant of his right to have a jury determine the quantity of drugs imported beyond a reasonable doubt. The defendant did not waive his right to have a jury find beyond a reasonable doubt that he imported over 50 grams of methamphetamine.

At sentencing on August 12, 2003, upon motion, the defendant received a downward departure for substantial assistance from level 35 to level 32. The defendant additionally moved for downward departure pursuant to USSG § 5K2.12 based on coercion and duress by Korean gang members residing in Korea and the Philippines. The defendant was coerced and forced to participate in the crime charged. Korean gang members threatened both the defendant and his family members with harm and death. Korean gang members brandished knives while making threats of death. When the defendant conceded, the Korean gang ensured the defendant's participation in the crime charged by sending a gang member to guarantee the defendant's performance. The District Court denied the defendant's request for downward departure for coercion pursuant to USSG § 5K2.12.

The District Court did not hold a hearing to determine the factual basis of the defendant's request for downward departure prior to ruling that the defendant's allegations of coercion and duress were not credible. The District Court held that the

defendant's factual statements lacked credibility because sentencing was the first time the court was made aware of any coercion. However, the court was made aware of the duress and coercion factors at the change of plea hearing upon questioning the defendant whether he was voluntarily entering into the plea agreement. The defendant at that time asserted that he was coerced into participating in the crimes charged due to threats from Korean gang members.

On August 13, 2003, the defendant was sentenced to 132 months imprisonment. Upon sentencing and pursuant to the plea agreement, the second and third counts of the indictment were dismissed.

ARGUMENT

A. STANDARD OF REVIEW

Whether the district court properly applied *Apprendi* is a question of law subject to de novo review. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2363 (2000); *United States v. Gill*, 280 F.3d 923, 930 (9th Cir. 2002). The factual findings underlying a district court's sentencing decision is reviewed for clear error. *United States v. Barnes*, 125 F.3d 1287, 1290 (9th Cir. 1997). A district court's evaluation of the reliability of evidence used for sentencing purposes is reviewed for abuse of discretion. *United States v. Shetty*, 130 F.3d 1324, 1331 (9th Cir. 1997).

B. THE DISTRICT COURT VIOLATED *APPRENDI* BY FAILING TO ADVISE THE DEFENDANT OF HIS RIGHT TO A JURY DETERMINATION OF DRUG QUANTITY BEYOND A REASONABLE DOUBT.

The drug quantity and type, which fixes the maximum sentence for a conviction, must be charged in the indictment, submitted to the jury, and proved beyond a reasonable doubt. *United States v. Buckland*, 289 F.3d 558 (9th Cir. 2002).

"Any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S. Ct. 2348, 2363 (2000). The failure to advise the defendant of the right to have a jury determine the quantity of drugs is reversible error. *United States v. Minore*, 292 F.3d 1109, 1117 (9th Cir. 2002) cert. den. 537 U.S. 1146, 123 S.Ct. 948.

The defendant was convicted and sentenced for conspiracy to import over 50 grams of methamphetamine in violation of 21 U.S.C. § 960. The penalty proscribed for a violation of 21 U.S.C. § 960(a) involving more than 50 grams of methamphetamine is a mandatory minimum term of 10 years, but not more than life. 21 U.S.C. §960(b)(H); whereas, the penalty for importation of 5 grams of methamphetamine is mandatory minimum term of 5 years, and not more than 40 years. 21 U.S.C. § 960(c)(H). Therefore, as a result of the quantity of drugs, the defendant in this case was subject to an increased penalty beyond the statutory

maximum. Thus, the requirements of *Apprendi* are applicable to the case herein.

The District Court failed to advise the defendant of his right to have a jury determine whether the quantity of drugs imported was more than 50 grams. Nowhere in the record does the District Court advise the defendant of this due process right to have a jury determine the quantity of drugs imported. Only one reference in the record is made to the defendant's right to a jury trial.

THE COURT: Okay. And that you would have the right to a trial by jury?

I'm just telling him of his rights.

DEFENDANT PAK: Yes.

Excerpts of Record, 5; Change of Plea hearing p. 11, line 13. As demonstrated by the record, the District Court did not specifically advise the defendant of the right to a jury determination of the quantity of drugs imported, as required by *Apprendi*.

In *United States v. Minore*, the district court did not specifically advise the defendant that the government would be required to prove that he had imported over 11,000 kilograms of marijuana. *United States v. Minore*, 292 F.3d at 1113. In finding that the district court did not comply with Rule 11(c)(1), Fed. R. Crim. Proc., the appellate court stated, “[w]hen drug quantity exposes the defendant to a higher statutory maximum sentence than he would otherwise face, drug quantity is not only an element of the offense, it is a critical element.” *Id.*

The district court is required to inform the defendant that he is entitled to a jury determination of drug quantity beyond a reasonable doubt before accepting the defendant's plea. *United States v. Minore*, 292 F.3d at 1113. The district court's acceptance of the defendant's plea without first advising the defendant that he is entitled to a jury determination of drug quantity beyond a reasonable doubt, is an *Apprendi* violation. *Id.*; see *United States v. Banuelos*, 322 F.3d 700, 705 (9th Cir. 2003)(in dicta). Because the defendant neither waived his right to have a jury determine the quantity of drugs imported, and because the District Court failed to advise the defendant of his rights, the sentence must be reversed for plain error.

C. THE DISTRICT COURT'S FINDING THAT THE DEFENDANT IMPORTED OVER 50 GRAMS OF METHAMPHETAMINE, WITHOUT FIRST ADVISING THE DEFENDANT THAT HE HAD A RIGHT TO JURY DETERMINATION OF THAT FACT BEYOND A REASONABLE DOUBT, ALSO VIOLATED *APPRENDI*.

The district court must empanel a jury to find the quantity of drugs possessed beyond a reasonable doubt, or in the case of a guilty plea, the court must make the determination after the defendant waives his right to a jury determination. *Apprendi v. New Jersey*, *supra*.; *United States v. Thomas*, 355 F.3d 1191, 1195 (9th Cir. 2004) citing *United States v. Banuelos*, 322 F.3d 700, 702 (9th Cir. 2003). The failure to inform the defendant of his right to a jury determination prior to acceptance of a guilty plea is an *Apprendi* violation and may require reversal for plain error. *United*

States v. Minore, 292 F.3d at 1113.

The defendant does not dispute that the drug quantity was charged in the indictment. However, the Court failed to notify the defendant of his right to have a jury determine the quantity of drugs imported, and obtain a waiver to this right prior to making a factual determination of drug quantity. As stated in *Villalobos*:

The fact that Villalobos stipulated to a drug quantity as part of his plea agreement does not show that he would have pled guilty to this quantity or pled guilty at all if he had been properly informed about the burden of proof as to quantity.

United States v. Villalobos, 333 F.3d at 1075.

Likewise, the fact that the defendant stipulated in his plea agreement that he conspired to import over 50 grams of methamphetamine does not affirmatively show that he would have pled guilty to this quantity had he been properly informed of his rights. Therefore, the factual finding by the district court that the defendant imported over 50 grams of methamphetamine was a clear violation of *Apprendi*. Hence, the sentence must be reversed for plain error.

D. THE *APPRENDI* ERRORS ARE PLAIN, AFFECT THE SUBSTANTIAL RIGHTS OF THE DEFENDANT, AND SERIOUSLY AFFECT THE FAIRNESS, INTEGRITY OR PUBLIC REPUTATION OF JUDICIAL PROCEEDINGS REQUIRING REVERSAL.

Where a district court fails to advise the defendant of the right to a jury determination of drug quantity beyond a reasonable doubt, the appellate court will

reverse the conviction only where the error is plain and affects the substantial rights of the defendant. *United States v. Villalobos*, 333 F.3d 1070, 1074 (9th Cir. 2003); *See United States v. Minore*, 292 F. 2d at 1117 citing *United States v. Olano*, 507 U.S. 725, 732, 113 S.Ct. 1770 (1993). Additionally, where there is a Rule 11 error, reversal is appropriate where the error seriously affects the fairness, integrity or public reputation of judicial proceedings. *United States v. Minore*, 292 F. 2d at 1117.

It is settled law in the Ninth Circuit that the failure to inform a defendant that the government would be required to prove drug quantity to a jury beyond a reasonable doubt is "plain" error. *United States v. Minore*, 292 F. 2d at 1117; *United States v. Banuelos*, *supra.*; *United States v. Villalobos*, *supra.* A defendant's substantial rights are affected where the errors are not minor or technical and the defendant did not understand the rights at issue when he entered his guilty plea. *United States v. Minore*, 292 F. 2d at 1118. Additionally, where a defendant is not informed that drug quantity is an element of the offense to be proven beyond a reasonable doubt, a guilty plea is not knowing, intelligent or voluntary. *United States v. Villalobos*, 333 F.3d at 1076. Clearly, the failure of the District Court to advise the defendant of the right to a jury determination of drug quantity beyond a reasonable doubt constitutes plain error and affects the substantial rights of the defendant.

The fairness, integrity or public reputation of judicial proceedings are seriously

affected by the District Court's *Apprendi* errors. First, this case is distinguishable from both *Minore* and *Villalobos*. Second, the District Court's error is exacerbated by the defendant's inability to speak English and the District Court's failure to specifically query the defendant on the quantity of drugs.

In *Minore*, after determining that the Rule 11 colloquy did not comply with *Apprendi*, there was plain error, and the defendant's substantial rights were affected, the court held that the district court's error did not seriously affect the fairness, integrity or public reputation of judicial proceedings. The court denied the defendant's request for relief because "Minore unequivocally admitted *in his plea agreement, during his plea colloquy and at his sentencing* that he should be held responsible" for 8,845 kilograms of marijuana. (Emphasis added.) *United States v. Minore*, 292 F.3d at 1119. This did not occur with Mr. Pak.

In *Villalobos*, the court in determining fairness held that the evidence as to quantity was not unequivocal because Villalobos contested the amount of drugs at sentencing. Despite the fact that Villalobos had stipulated in his plea agreement the quantity of drugs, the court disregarded the stipulation finding, "We give little weight to Villalobos' stipulation, entered when he was not properly informed . . ." *United States v. Villalobos*, 333 F.3d at 1078.

The defendant herein did not make an unequivocal admission of drug quantity

in his plea agreement, during his plea colloquy or at his sentencing. In *Minore*, the plea agreement provided:

[F]or purposes of calculating Gary Minore's sentencing guidelines range under USSG §2D1.1, the parties agree that the quantity of drugs for which *Gary Minore should be held responsible is the marijuana involved in the three loads, namely, a total of 25,800 pounds (11,703 kilograms).*(Emphasis added.)

United States v. Minore, 292 F3d. at 1114. Unlike *Minore*, the defendant's plea agreement merely stipulates to facts, which include drug quantity. The defendant's plea agreement stipulates that "The approximate gross weight of the liquid-crystal substance was 13,263.32 grams of methamphetamine (gross weight)." Excerpts of Record, 2; Plea Agreement, p. 5 line 28 through p. 6 line 1. A mere stipulation, where a defendant is not properly informed of his rights as mandated by *Apprendi*, is not an unequivocal admission of drug quantity. See *United States v. Villalobos*, 333 F.3d at 1078.

Similarly, at the change of plea hearing, the defendant did not make unequivocal admission of drug quantity. The District Court merely queried whether the drug quantity exceeded 50 grams of methamphetamine. Excerpts of Record, 6; Change of plea hearing, p. 14, lines 8-16. The District Court did not specifically question whether the defendant was admitting to importing 13,263.32 grams of

methamphetamine. In addition, at the sentencing hearing, the defendant did not make any unequivocal admission of drug quantity and the court did not specifically query the defendant regarding drug quantity.

In addition to the defendant's inability to fully understand the criminal proceedings against him in light of the *Apprendi* errors in the court below, the District Court did not at the change of plea or sentencing hearing question the defendant on his responsibility for a specific quantity of drugs. These facts coupled with the defendant's inability to understand or speak the English language, and the *Apprendi* errors in this case call to doubt the fairness, integrity or public reputation of judicial proceedings.

E. THE DISTRICT COURT ERRONEOUSLY HELD THAT THE DEFENDANT FAILED TO RAISE THE COERCION AND DURESS FACTORS PRIOR TO SENTENCING, AND THUS THE DENIAL FOR DOWNWARD DEPARTURE WAS CLEARLY ERRONEOUS.

A district court may decrease a defendant's sentence under a theory of imperfect duress, i.e., coercion or duress under circumstances not amounting to a complete defense. USSG § 5K2.12; *United States v. Lopez-Garcia*, 316 F.3d 967, 973 (9th Cir. 2002). In declining to depart downward based on coercion and duress, the district court made a factual determination that the defendant's statements were not credible.

The District Court's finding that the defendant's statements lacked credibility

was based on the erroneous fact that the defendant did not raise the issue prior to sentencing. The District Court was clearly made aware that the defendant was pleading guilty to the offense as a result of coercion from Korean gang members at the change of plea hearing.

The COURT: Has anyone attempted in any way to force you to plead guilty in this case?

Defendant PAK: No.

The COURT: Are you pleading guilty of your own free will because you are guilty?

Defendant PAK: Yes. The rumors that I hear from the sources in Korea is that I'm (inaudible)

Mr. HARTSOCK: The threat that he feels - - the force that he feels to plead is not from anyone here, it's from there. It's from the other side in terms of if he feels any coercion to plead guilty.

The COURT: Well, but there's - - see, this is - - the question I asked was are you pleading guilty of your own free will because you are guilty, and I need him to answer. He is going to be pleading guilty, not as a result - - not as a result of coercion from anybody. This is what he wants to do.

Mr. HARTSOCK: Right. He is, he is pleading guilty because he desires to cooperate because he doesn't want to run the risk that he would have if he went back to Korea.

The COURT: Okay.

Mr. HARTSOCK: He understands the danger of the people he works for.

(Excerpts of Record, 4; Change of Plea Hearing, p. 7 line 21 through p. 9 line 5.)

Notably, the District Court made no further inquiry of the defendant to determine if he was or was not coerced into pleading guilty.

The District Court at the sentencing hearing stated the following in issuing its ruling:

The first time the court was made aware of the possibility of coercion and duress was in the defendant's response to the PSR. The timing of this information does not lend credence to the defendant's contention. Instead, the court views defendant's assertions a mere self-serving statements.

(Excerpts of Record, 7; Sentencing Hearing p.4, lines 10 - 15.)

The District Court's reliance on this factual basis was clearly erroneous as the court was made aware of the duress and coercion factors at the change of plea hearing when the defendant was questioned about whether he was voluntarily entering into the plea agreement. Although a district court's refusal to depart downward is generally not reviewable, *United States v. Pinto*, 48 F.3d 384, 389 (9th Cir. 1995) cert.

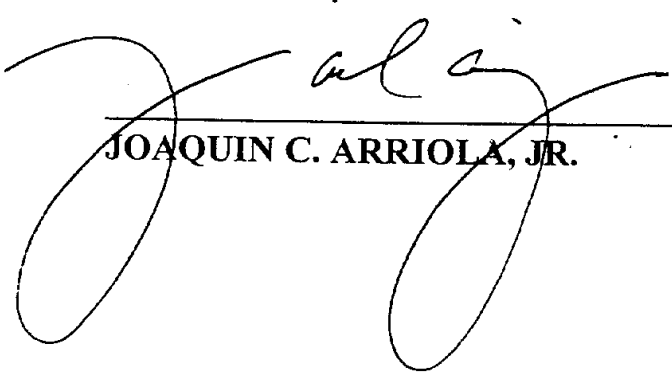
den. 516 U.S. 841, 116 S.Ct. 125 (1995), factual findings are reviewed under a clearly erroneous standard. *United States v. Barnes, supra*. Because the District Court's finding was based on an erroneous fact, its refusal to depart downward based on §5K2.12 must be reversed.

CONCLUSION

The District Court committed plain error in failing to properly advise the defendant of his right to a jury determination of drug quantity. As such, the defendant's plea, the conviction and sentence must be vacated and remanded. Additionally, because the District Court relied on an erroneous fact to determine credibility in its application of §5K2.12, the case must be remanded for resentencing and for consideration of whether defendant should be afforded a downward departure from adjusted offense level 32.

Respectfully submitted this 2nd day of April, 2004.

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Attorneys for Appellant Jae Jun Pak

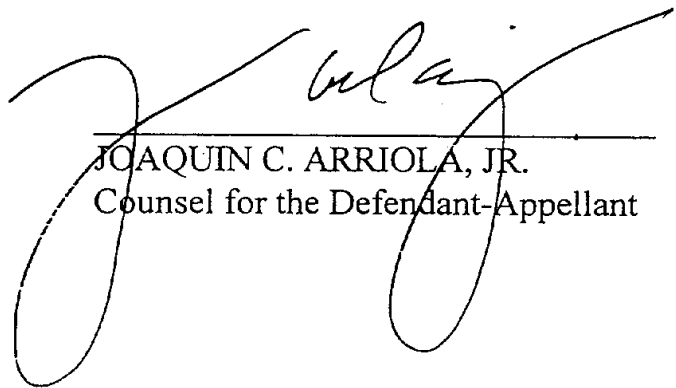


JOAQUIN C. ARRIOLA, JR.

CERTIFICATE OF COMPLIANCE

Pursuant to Ninth Circuit Rule 32-1 and Fed. R. App. P. 32(a)(7)(C), the undersigned counsel hereby certifies that the OPENING BRIEF OF DEFENDANT-APPELLANT JAE JUN PAK is proportionately spaced, has a typeface of 14 points and contains 3,828 words.

Dated on this 2nd day of April, 2004.

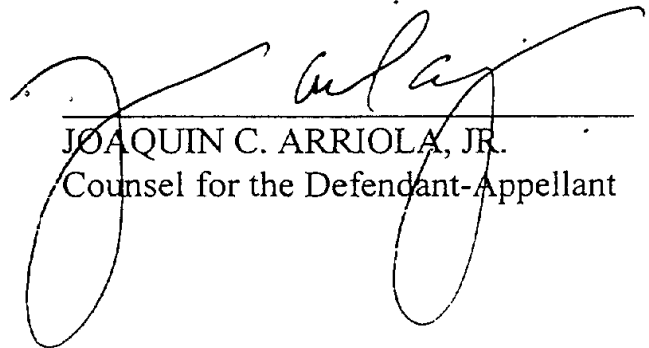


JOAQUIN C. ARRIOLA, JR.
Counsel for the Defendant-Appellant

CERTIFICATE OF RELATED CASES

The undersigned counsel of record for DEFENDANT-APPELLANT JAE JUN PAK hereby certifies that there are no known related cases in this Court to the referenced appeal.

Dated on this 2nd day of April, 2004.



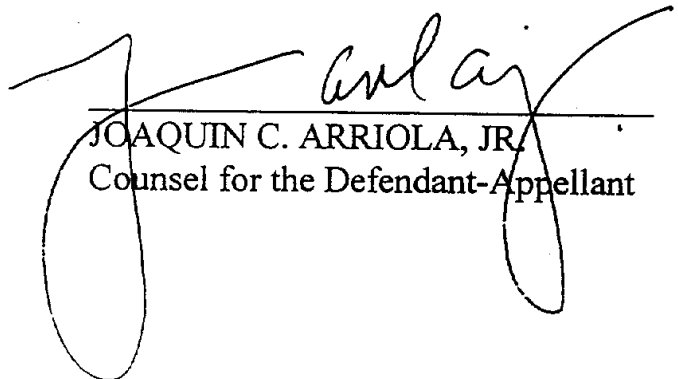
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I, Joaquin C. Arriola, Jr. do hereby certify that on this 2nd day of April, 2004, I caused to be served two (2) copies of the OPENING BRIEF OF DEFENDANT-APPELLANT JAE JUN PAK and One (1) copy of the EXCERPTS OF RECORD OF DEFENDANT-APPELLANT JAE JUN PAK upon Plaintiff-Appellee, by hand-delivering copies thereof to:

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Dated on this 2nd day of April, 2004.



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CERTIFICATE OF SERVICE

This is to certify that I have, on 19 day, of APRIL 2004, placed a true and exact copy of the foregoing, in the u. s. mails, via certified mail addressed to

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